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Supreme Court of the United States

OCTOBER TERM, 1957

INTERNATIONAL TERMINAL OPERATING CO. INC.,
successor to THE JARKA CORPORATION,

Petitioner,

against

IINO KAUIN KAISHA, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GARVEY & CONWAY,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1957.

INTERNATIONAL TERMINAL OPERATING CO. INC.,
successor to THE JARKA CORPORATION,

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IINO KAUIN KAISHA, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case.

Opinions Below

No opinion was rendered herein in the District Court.

The opinion of the United States Court of Appeals is reported at Fed. 2d . A copy thereof is appended.

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered on February 5, 1958. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

Question Presented

Where a longshoreman was injured discharging cargo from a ship owned by respondent and loaded by it or its agents in Japan, owing to breaking of defective or unfit dunnage underneath and supporting a case of cargo on which the longshoreman stepped, and no act of the stevedore employer caused or contributed to the condition of dangerous stowage, whether the respondent shipowner may recover on a cause of action for commonlaw and implied indemnity against the stevedore employer, on evidence and findings that defective dunnage caused the accident and of negligence of the employer only in failing to correct conditions and render the working area safe.

Statement of Case

This action was originally brought by a longshoreman injured while discharging a ship, against the shipowner, who impleaded the employer stevedore under a third party complaint for commonlaw indemnity, charging affirmative or active negligence of the petitioner stevedore and no affirmative negligence on its own part, and upon implied contract of indemnity. The original action was settled prior to trial for an amount stipulated to be reasonable, and trial had on the third party claim before Hon. Edward Weinfeld and a jury.

The plaintiff was injured by a fall against the edge of a cargo case during the discharge of the respondent's S. S. "Tomashima Maru". The plaintiff and his partner were in the hold standing on a tier of cases of cargo and pulling a cargo pallet from the top of five or six which had been sent down. He testified (26):

> "I was pulling and stepping backwards and I was stepping with the right foot back and I went on top of a case.

So underneath one of these cases the dunnage that we use, these strips of wood underneath crack, causing the case to tilt, and I fall back * * *."

With regard to the dunnage—wooden boards used for bridging irregularities in tiers of cargo, or separating cargo—he testified (27):

"The type of dunnage is very thin dunnage. They don't use our American dunnage, they use heavy wide boards. Sometimes even a foot.
They use about four inches wide, what can I say, about a quarter inch thick. It is very light wood."

(We take this to mean that American dunnage was heavy, Japanese light.) DiCostanzo, the hatch foreman, similarly testified (34):

"It is usual dunnage they use on all Japanese ships.
Q. What is that? A. Small pieces, about four inches wide, quarter inch thick. Sometimes even smaller, sometimes a little bigger."

In regard to the use of the dunnage, DiCostanzo testified (34):

"* * * all these cases aren't even, they come in various sizes. In order to make them, the way they load in Japan, to make a level floor, which they can't because all the cases aren't the same size, they have to use pieces of dunnage to level the floors so they can load it."

It was testified by all witnesses that all dunnage was thrown to the wings of the hatch as the work progressed, to get it out of the way (27, 35, 56). The dunnage beneath the cases could not, of course, be seen until the cases were lifted (28, 36). This was the first time such an occurrence had happened (31).

No testimony was given of the condition of the particular dunnage underneath the case in question except the quoted testimony of the generally small size of the Japanese dunnage. Testimony was given of the witnesses having seen broken or cracked pieces of dunnage in the hold generally, a thing also observed in other ships (36). Expert testimony was offered to the effect that while "there is a certain amount of broken dunnage of any ship" that "if there is enough *broken dunnage on the floor that you are working on to endanger a man's footing*" the stevedore will generally clean it out of the way and make a platform of other dunnage or pallets (39). (We italicize the foregoing, because the opinion paraphrases this "when unfit dunnage is found in a hold.") This condition did not exist here since, as has been noted, all dunnage on the floor had been removed. Standing on the cases was necessary in any event (36).

The ship was loaded in Japan (31). While the party loading the ship was not identified, it was evidently the respondent or its agents.

The Court submitted to the jury five questions, which with answers were as follows:

1. Was defective or unfit dunnage the cause of the accident to Parenzan? A. Yes.

2. If your answer to question 1 is yes, did the defendant, International Stevedoring Company, through its hatch foreman, DiCostanzo, know as the unloading of the cases progressed from 8:30 A. M. to 10:00 A. M. that defective or unfit dunnage had been used? A. Yes.

3. If your answer to question 2 is yes, were there any precautions which the defendant, that is the stevedoring company, in the exercise of reasonable care could have taken to correct conditions and render the working area safe? A. Yes.

4. If your answer to the foregoing question No. 3 is yes, did the defendant take such reasonable precautions to correct conditions and render the area where the men worked safe? A. No.

5. If your answer to question 4 is no, then did the failure to take such reasonable precautions render the working area unsafe and was such failure the cause of the accident to Parenzan? A. Yes.

While no actual knowledge by petitioner of the hidden defect in stowage was claimed, unquestionably a "latent dangerous condition", notice was sought to be inferred from the presence of broken dunnage in the hold. It was contended by petitioner both on motion to dismiss (44) and in the Court of Appeals that this lacked the essential of constructive notice that the danger be apparent, particularly in view of the testimony that there is broken dunnage in all ships. The Court of Appeals declined to rule on this because the motion had not been denominated a motion for direction of a verdict. Since nobody was misled, we believe this misnomer unsubstantial. However, while notice was necessary to a finding of any sort of negligence on the part of petitioner, we do not believe this to be determinative of the question of the character of negligence actionable in the circumstances of this case, particularly since even actual notice of bad stowage does not necessarily prevent recovery against a shipowner (*La Guerra* v. *Brasiliero*, 124 Fed. 2d 553, 2d Cir. 1942), and notice of visible defects did not foreclose recovery in *Ryan* or *Weyerhaeuser*.

POINT I

The decisions below are contrary to *Ryan Stevedoring Co.* v. *Pan Atlantic*, 350 U. S. 24, and the established law of indemnity as there applied.

This case is controlled by *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124, reargument of

349 U. S. 901, affirming *Palazzolo* v. *Pan Atlantic S. S. Co.*, 211 Fed. 2d 277 (2 Cir. 1954) which reversed 111 Fed. Sup. 505, and *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co., Inc.* (March 3, 1958), rendered since the Court of Appeals decision in this case. The other cases cited by the Court of Appeals are *American President Lines* v. *Marine Terminals Corp.*, 234 Fed. 2d 753, cert. den. 352 U. S. 926, and *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 134.

Ryan assuredly held that creation of a hazard of bad stowage is negligence actionable in an indemnity action with respect to injuries to longshoremen which it brings about, and that "failure to discover or correct" the breach by the indemnitee does not prevent recovery by him. It held further that indemnity was not barred by notice, constructive at least, to the shipowner, or even by the shipowner's failure to supervise the loading, a duty owing the injured plaintiff but not the stevedore. The dissenting opinion of Mr. Justice Black considered that the legislative policy of the Longshoremen's and Harbor Workers' Act and the policy of shipowners' responsibility of *Sieracki* both militated against allowance of indemnity even though the creation of the hazard was found to be that of the stevedore. Except for these questions of policy, and the effect of the shipowner's duty of supervision of loading, *Ryan* presented the most typical and familiar instance of indemnity based on the creation of a hazard, in favor of a party negligent only in failing to guard against or rectify it, "a negligent failure to make safe a dangerous condition of land or chattels which was created by the misconduct of the other" (*Restatement, Restitution*, Ch. 3, § 75). *Weyerhaeuser* similarly held that if the shipowner's liability were predicted on failure to "detect and correct" an unsafe condition created by the stevedore, recovery against the latter might follow, but did not expressly rule whether this would be so if, as here, there was a "failure to correct or warn respondent

[stevedore] of a latent dangerous condition known to petitioner."

Union Stockyards Co. v. *C. B. & Q. R. R. Co.*, 196 U. S. 217, 228:

"The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable for failure to discover and correct the defect caused by the positive act of the other."

Standard Oil Co. v. *Robins Dry Dock & Repair Co.*, 32 Fed. 2d 182, 184 (2 Cir. 1929):

"The installation of a defective gangway for the use of employees involved active negligence on the part of the drydock company, whereas the neglect of the Standard Oil Company to warn its employees was a secondary act of omission."

The chief difference between this case and *Ryan* is that it was here the shipowner instead of the stevedore that created the hazard, and the stevedore rather than the shipowner who has been charged with negligence only in "failure to discover or correct" the condition of bad stowage. Yet here the stevedore, who had absolutely no part in the creation of the condition of bad stowage and not even the duty of supervision of it that the shipowner in *Ryan* had, has been held liable to the very party that did create it.

McFall v. *Compagnie Maritime Belge*, 304 N. Y. 314, is no less typical, for the stevedore was found primarily at fault for rough handling in stowing drums of toxic cargo, and the shipowner negligent only in failing to warn of or correct it. *American President Lines* v. *Marine Terminals Corp.*, 234 Fed. 2d 753 (9th Cir., 1956) cert. den. 352 U. S. 926, involved a draft of cargo being discharged dislodging

a loose strongback over the hatch, of which the stevedore had been expressly warned and which its duties of opening hatches required removal. This was a fault in the actual performance of the work of the stevedore, and such a case has nothing in common with one where the stevedore's actual performance of its work neither caused nor contributed to the accident, but merely brought its employee within range of a trap created by the shipowner's stowage with flimsy and inadequate dunnage.

Respondent in the Court below, and the Ninth Circuit in *American President Lines*, placed considerable reliance also on the preceding *U. S.* v. *Rothschild International Stevedoring Co.*, 183 Fed. 2d 181 (9th Cir., 1950) in which a shipowner was allowed indemnity where a longshoreman was injured by the stevedore's use of a slipping winch. In that case, and in *American President Lines*, reliance was in turn placed upon a Restatement reference to active and passive negligence (*Restatement, Torts*, Sec. 441) not as applied to indemnity but with respect to intervening negligence as proximate cause, in which the last of successive acts of negligence is described as "active negligence." Such a sequence is the reverse of most indemnity situations, such as *Ryan* and *Weyerhaeuser*, where creation of a hazard necessarily precedes notice and failure to correct it. This definition is furthermore inapplicable to the present case, since it applies to

> "a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious."

Both the Second Circuit (*Slattery* v. *Marra Bros.*, 186 Fed. 2d 457) and the Third (*Hagens* v. *Farrell Lines*, 237 Fed. 2d 497) have declined to follow this. While we believe that active use of a defective winch is not the same as merely falling on bad stowage, this is a related question

upon which several circuits are in disagreement, and the present decision is certainly in conflict with *Hagens* v. *Farrell Lines, supra,* page 482:

> "The instant case presents the converse of the Ryan situation. Here, the shipowner, Farrell, was held responsible in the district court to the injured longshoreman because of a defective winch, i.e., unseaworthiness or a negligent failure to furnish a safe place to work. But the stevedoring contractor had not undertaken to perform Farrell's non delegable duty nor did Lavino create the defective condition * * *. A fortiorari, Farrell is not entitled to indemnity from Lavino."

As heretofore noted, it is inferable from *Weyerhaeuser* that liability based on a shipowner's "failure to correct or warn respondent of a latent dangerous condition" would not permit recovery against the stevedore. Here the shipowner has been allowed recovery where it was responsible for the creation of such a condition.

We do not follow the observation in the opinion below that while a breach of duty by respondent was established —a breach that *Ryan* and all other cases have held to be of a fundamental and non-delegable duty—that failure to correct or guard against it, the only fault found against petitioner, was the "proximate and primary" cause of the injuries because last in point of time. Proximate it might be, as regards the plaintiff, for there are normally two proximate causes in any case of indemnity, but as between these parties its designation as primary can hardly be divorced from consideration of the character of breach of duty of the other party. Since respondent's breach of duty was established by its own testimony of light Japanese dunnage, and the occurrence of an accident from bad stowage and nothing else, on a ship in the ownership and operation of respondent, we likewise fail to understand the statement that "No evidence was introduced as to the neg-

ligence of the ship," as if the burden still rested on petitioner to confirm this by testimony of the conduct of the loading by respondent in Japan. Absence of culpable negligence in an indemnity case is even more a burden of the indemnitee than freedom from contributory negligence is the burden of a plaintiff in an ordinary negligence case (*Schwartz* v. *Merola Bros. Construction Corp.*, 290 N. Y. 145, 156; *Fitzpatrick* v. *International Railway Co.*, 252 N. Y. 127, 134). It is an essential rather than a separate issue and certainly consideration of it cannot be by-passed where it is established by respondent's own evidence. Nor was the question of respondent's negligence unmentioned, for it was an issue presented by the allegations of the third-party complaint that the unseaworthiness of the vessel was "made so" and "created" by petitioner "without any affirmative acts of negligence" of respondent (5), and the Trial Court refused a request to charge

> "that the owner of the vessel was under a duty to supervise the loading of the vessel." (66)

No doubt this should have been elaborated upon, particularly with the hindsight afforded by *Weyerhaeuser*, but its denial was obvious error, as the Court of Appeals opinion plainly indicates, and its refusal, and the formulation of questions for the jury which ignored it, precluded any consideration of the question. The findings themselves were for the same reason insufficient for a verdict, as a verdict on special interrogatories must be supported by them. *Hodges* v. *Easton*, 106 U. S. 105. The evidence and findings in a commonlaw indemnity action must be legal liability toward the party injured (probably established but not found); culpable negligence of the indemnitor (neither established nor found); and freedom from such negligence of the indemnitee (neither established nor found). No findings nor instructions bearing upon breach of implied contract were made. The finding that defective dunnage caused the accident cannot be made to square with

the conclusion of the Court of Appeals that petitioner's performance of its work caused it.

The concluding statement of the Court of Appeals "That the shipowner failed to discover and correct the improper stow is no defense" is a complete reversal of the fault chargeable and charged against it, its own bad stowage to begin with. It cannot be reduced to mere failure to discover and correct by this too charitable understatement. Its fault was the creation of the danger, a matter with which it is fully chargeable even if, as does not appear to have been the case here, it was the work of an independent contractor in Japan. As long as commonlaw indemnity has existed, liability has not been avoided by delegation of the actual work to another (*City of Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick. (40 Mass.) 24 (1839), and this of course is true of a shipowner's liability for faulty stowage. *Munson S. S. Lines* v. *Newman*, 24 Fed. 2d 416 (5 Cir. 1928).

We have treated the question thus far principally from the standpoint of common law tort indemnity, since it may be that such a liability is concurrent with that of implied contract. Respondent's case is no better when considered from the latter standpoint. Failure to prevent the accident may have been a breach of duty toward the plaintiff, but the performance of a contract with respondent did not require the correction of respondent's own faulty work of stowage, precisely as the shipowner's failure of supervision or correction of the stevedore's own work was a breach of duty toward the plaintiff in *Ryan*, but not toward the original wrongdoer. "• • • although negligent as toward its servants it had shown all the care which the defendants had a right to expect" (*Boston Woven Hose and Rubber Co.* v. *Kendall*, 178 Mass. 232).

American Mutual Liability Insurance Company v. *Matthews*, 182 Fed. 2d 322 (2 Cir. 1950):

> "Nor can a promise be implied that he will use care to detect any defect in the equipment which

patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise such an implication would be utterly unreasonable."

The contract or warranty implied in *Ryan* and *Weyerhaeuser* is no broader, certainly, than those involved in express contracts to indemnify against damage growing out of the performance of work, which, like exemptions from liability, have been generally construed not to include the indemnitee's own negligence unless unequivocally so expressed. Thus *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, held express indemnity against "negligence or fault of the stevedore, his employees and servants" ambiguous even with respect to liability for concurrent acts of negligence of shipowner and stevedore. In *Thompson Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, the indemnity agreement was "against all claims for damages to persons growing out of the execution of the work." The Court stated:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms. * * * The mere fact that the accident occurred while the employees of appellant were engaged in work as defined in the contract is not sufficient to impose liability under the indemnity agreement. While it is true that the accident would not have occurred had they not been so engaged, the work was not the cause of the accident. It was respondent's own negligence which was the cause, and under such circumstances the language of the indemnity agreement is far too general in its nature to impose liability upon the appellant."

To the same effect are *Wallace* v. *U. S.*, 18 Fed. 2d 20 (9 Cir. 1927); *Mostyn* v. *D. L. & W. R. R. Co.*, 160 Fed. 2d 15 (2 Cir. 1947) and *Schwartz* v. *Merola Bros. Contracting Co.*, 290 N. Y. 145, among others. The analogy of manufacturer's warranty points toward responsibility of the party supplying and employing the defective dunnage, which, rather than petitioner's work, was found to have caused the accident.

We do not believe the intention of *Ryan* or *Weyerhaeuser* was to impose upon a stevedore, involved only in discharging, all responsibility for accidents or to eliminate as a fault breach of the ship's corresponding warranty of seaworthiness in the conditions under which the stevedore was obliged to work. This is reducing these cases to the proposition that a stevedore, loading or discharging, is at fault under all circumstances because stevedores were there at fault.

POINT II

Extension of stevedore's liability in indemnity to danger wholly created by a shipowner is contrary to the policies referred to by the minority in *Ryan*.

The decision in the courts below is as incompatible with the view of the minority of the Court in *Ryan* as with that of the majority. It not only reverses established principles of actionable fault in indemnity actions, by allowing recovery by the creator of a virtual trap, who would ordinarily be considered primarily culpable even if the injured longshoreman was no more than a bare licensee, but missaplies *Ryan* to impose on a stevedore a whole new field of liabilities, virtually everything short of intentional injuries. It does so even when the injury was related to the performance of the stevedore's work only by the fact that this work brought its employees into contact with a hazard of the ship's creation; and coupled with the implication of constructive notice from conditions always present, it approximates absolute liability.

A minority of the Court in *Ryan* considered that recovery on the basis of indemnity, in a case where some negligence was chargeable against the shipowner, was an extension of the doctrine which ran counter to the policy of the Longshoremen's and Harbor Workers' Act, legislatively providing for liability in this field, and would in practice curtail the remedy afforded by *Sieracki* against negligent shipowners. While these considerations did not prevail, they continue to be of substantial weight against a far more radical extension of stevedores' liabilities and diminution of shipowners' responsibility. The policies which militated against the allowance of indemnity in *Ryan* should certainly forbid it here, where the substantive law applied by the majority dictates that result as well.

Reasons for Granting the Writ

1. Rule 38(5) of the Rules of this Court provides that among the reasons which may be considered for granting a review on a writ of certiorari are that it involves an important question of Federal law which has not been but should be decided by this Court, and that it determines a federal question in a way probably in conflict with applicable decisions of this Court. It is submitted that these reasons are here present.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

GARVEY & CONWAY,
Attorneys for Petitioner.

GEORGE S. PICKWICK,
PAUL A. CROTCH,
Of Counsel.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 133—October Term, 1957

Argued December 13, 1957 Decided February 5, 1957

Docket No. 24684

DANTE PARENZAN,

Plaintiff,

against

IINO KAUIN KABUSHIKI KAISYA, also known as KOKUSAI LINE, a corporation, and STATES MARINE CORPORATION, a corporation,

Defendants,

and

IINO KAUIN KAISHA, LTD.,

Defendant and Third-Party Plaintiff-Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO. INC., successor to The Jarka Corporation,

Third-Party Defendant-Appellant.

Before: MEDINA, LUMBARD and WATERMAN, Circuit Judges.

On appeal from a judgment entered on the verdict of a jury by Edward Weinfeld, J., Southern District of New

York (Weinfeld, J., presiding) holding the defendant third-party plaintiff entitled to indemnity for a settlement of the claim of the plaintiff, Parenzan, for personal injuries. Affirmed.

GEORGE S. PICKWICK, for Appellant.

ROLAND C. RADICE, VERNON S. JONES and SAMUEL L. ALBARINO, for Appellee.

LUMBARD, *Circuit Judge:*

On November 24, 1952 the plaintiff, Dante Parenzan, a longshoreman, was injured on the M.V. Tomishima Maru, a freighter owned and operated by the defendant-third-party plaintiff, the Iino Kaiun Kaisha, Ltd. The vessel was docked at Pier 1, Erie Basin, Brooklyn, and was being unloaded by the Jarka Corporation, Parenzan's employer and the corporate predecessor to the third-party defendant.

Parenzan had started work in a crew of some 21 longshoremen at 8:00 A.M. on the morning of the 24th. The crew was detailed to unload hatch No. 2 of the Tomishima Maru under the direction of Nicholas Di Costanzo, a 16 year old gang foreman. After removing the hatch cover, Di Costanzo testified that he saw dunnage on top of the cargo and ordered the men to throw it out of the way. The dunnage consisted of strips of light wood placed between the different size crates to even the tiers of cargo. The evidence showed that pieces of it were broken and split, and that Di Costanzo noting this had warned the men to be careful.

The unloading had been in progress for about an hour and a half and one or more tiers of the crates had been removed, when Parenzan stepped on a crate supported by some of this unfit dunnage and the dunnage gave way under his weight causing him to fall on the base of his spine. He sought recovery for the resulting injuries from

the shipowners alleging unseaworthiness and negligence. The case was settled for $6,500, an amount all parties agree was reasonable.

By the instant action the shipowners seek indemnity for the amount of the settlement from the stevedoring firm on two theories: (1) that the stevedoring firm was negligent in permitting Parenzan to work in a dangerous area without adequate supervision; and (2) that the stevedoring firm breached the warranty implied in the stevedoring contract that it perform the work in a competent and safe manner.

At trial Parenzan and Di Costanzo testified to the facts above stated and John Virgona, Parenzan's work partner, corroborated their testimony. The third-party plaintiff also called Paul J. Keeler as a stevedoring expert. He testified that when unfit dunnage is found in a hold it is the usual practice to put in a flooring of good dunnage or of stevedore's pallets before allowing the men to unload from that hold. No witnesses were called by the third-party defendant nor was there a motion for a directed verdict.

At the conlusion of the trial Judge Weinfeld put five questions to the jury. These questions and the jury's answers were as follows:

> "Q. Was defective or unfit dunnage the cause of the accident to Parenzan? A. Yes.
>
> Q. If your answer to question 1 is Yes, did the defendant, International Stevedoring Company, through its hatch foreman, Di Costanzo, know as the unloading of the cases progressed from 8:30 a.m. to 10:00 a.m., that defective or unfit dunnage had been used? A. Yes.
>
> Q. If your answer to question 2 is Yes, were there any precautions which the defendant, that is the stevedoring company, in the exercise of reasonable

care, could have taken to correct conditions and render the working area safe? A. Yes.

Q. If your answer to the foregoing question No. 3 is Yes, did the defendant take such reasonable precautions to correct conditions and render the area where the men worked safe? A. No.

Q. If your answer to question 4 is No, then did the failure to take such reasonable precantions render the working area unsafe and was such failure the cause of the accident to Parenzan? Yes."

Judgement was entered for the shipowner on the special verdict.

On this appeal the third-party defendant raises three issues: (1) that there was no substantial evidence of notice of the improper stowage; (2) that the third-party defendant was not shown to be actively negligent; and (3) that the shipowner must be considered *in pari delicto* with the stevedoring firm and thus barred from recovery.

First, since the third-party defendant did not move for a directed verdict, the sufficiency of the evidence of notice is not properly before us, and we need not pass on it. See *Rotondo* v. *Isthmanian Steamship Co.*, 243 F. 2nd 581 (2 Cir., 1957) and the cases cited therein.

Secondly, when a person is said to be "actively negligent" so that he is required to indemnify a joint tortfeasor, it means only that he was the primary or principal wrongdoer, *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (1952). In the instant case the appellant's negligence was shown to be active. With knowledge of the defective condition of the stow, the stevedoring company continued the unloading without taking corrective measures, and its negligence was the proximate and primary cause of the injury to Parenzan. *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2nd 753 (9 Cir. 1956).

Lastly, the shipowner cannot be said to have been *in pari delicto* with the appellant. True it had the duty to see that the stow was proper and this duty was breached. But the breach of this duty was merely a condition which set the stage for what followed: in this case, the defendant's negligence in operating with inferior dunnage. *American President Lines* v. *Marine Terminal Corp., supra.* Furthermore, this argument that the shipowner was *in pari delicto* first saw the light on this appeal. It was not brought forth in the trial of the action. No evidence was introduced as to the negligence of the ship; the stevedore's defense being solely its own freedom from negligence. Thus the argument is untimely.

Moreover, the shipowner's complaint was phrased not only in terms of negligence but also in terms of a breach of warranty. Under the stevedoring contract the third-party defendant impliedly warranted to perform the work in a competent and safe manner. *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124 (1956). It is clear this warranty was breached. That the shipowner failed to discover and correct the improper stow is no defense. *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp., supra.*

The judgment is affirmed.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit held at the United States Courthouse in the City of New York on the 5th day of February, one thousand nine hundred and fifty eight.

Present: HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
HON. J. EDWARD LUMBARD

DANTE PARENZAN,

Plaintiff,

against

IINO KAUIN KABUSHIKI KAISA, also known as KOKUSAI LINE, a corporation and STATES MARINE CORPORATION, a corporation,

Defendants,

and

IINO KAUIN KAISHA, LTD.,

Defendant and Third-Party Plaintiff-Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO. INC., successor to THE JARKA CORPORATION,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 872.

INTERNATIONAL TERMINAL OPERATING CO. INC.,
successor to THE JARKA CORPORATION,
Petitioner,

against

IINO KAIUN KAISHA, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JAMES B. MAGNOR,
Attorney for Respondent,
Iino Kaiun Kaisha, Ltd.,
120 Broadway,
New York 5, N. Y.

VERNON S. JONES,
Of Counsel.

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against

IINO KAIUN KAISHA, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

In this indemnity action, Iino Kaiun Kaisha, Ltd. (hereinafter referred to as the Shipowner) recovered a judgment of $6,500 against International Terminal Operating Co. Inc., successor to The Jarka Corporation (hereinafter referred to as the Stevedore), after a trial before a judge and jury. The judgment entered upon the decision of the jury was affirmed by the Court of Appeals for the Second Circuit, reported in 251 F. 2d 928.

The judgment represented the amount of a settlement paid by the Shipowner to one Dante Parenzan, a longshoreman employed by the Stevedore, who had sued the Shipowner for damages for an injury sustained on November

24, 1952, while working on the Shipowner's vessel, the SS. *Tomishima Maru.*

The Stevedore was impleaded in Parenzan's action, and, thereafter, Parenzan's action was settled and severed from the present claim.

The only issue raised by the Stevedore at the trial was whether or not there was proof that the Stevedore was negligent. The Stevedore did not raise the issue of the negligence of the Shipowner; nor if the Shipowner was negligent, the character of the Shipowner's negligence compared with the Stevedore; and did not ask the court to go to the jury on those issues (42).*

The facts, as contained in the opinion of the Court of Appeals for the Second Circuit, are not challenged by petitioner Petitioner does, however, argue that there are other "facts" which are not supported by the record. It says, for example, on page 4 of the petition, that the ship was loaded in Japan by the respondent or its agent and, again on pages 7, 8, 9, 11 and 13, that it was the Shipowner which created the hazard resulting from improper dunnage. The record does not support these asserted "facts" and the court should not be influenced by argument of counsel conjured up from partial excerpts from the testimony and tied together by theories of counsel which, of course, are not a substitute for testimony. The record fully substantiated the findings made by the jury. Briefly, the findings made and the evidence in support of each finding are as follows:

1. Parenzan's accident was caused by defective or unfit dunnage.

Parenzan testified that the accident occurred when he stepped on a case and the dunnage broke (26).

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* References are to pages of Appendix to Brief of Third Party Defendant-Appellant filed in the court below.

2. The Stevedore, through its hatch boss, DiCostanzo, knew as the unloading progressed from 8:30 a. m. to 10:00 a. m., that defective or unfit dunnage had been used.

Hatch boss DiCostanzo admitted that he saw dunnage crack, break and give way prior to the accident (35, 36).

3. There were ordinary and usual precautions which the Stevedore, in exercise of reasonable care, could have taken to correct the conditions and render the work area safe.

Keeler, an expert witness with approximately 26 years' experience (38), testified to the usual custom of a Stevedore to place a flooring of dunnage or pallets for the longshoremen to work upon when they find broken or defective dunnage in a hatch (39). There was no expert testimony to the contrary.

4. The Stevedore did not take reasonable precautions to correct conditions and render the area where the men worked safe.

DiCostanzo, the 16 year old hatch boss, admitted that he did not do anything to remedy the conditions but merely told his men to "watch yourselves" (37).

5. The failure to take such reasonable precautions rendered the working area unsafe and was the cause of the accident to Parenzan.

The testimony of the hatch boss, DiCostanzo, and the expert, Keeler, showed that there was a danger to the men working which the Stevedore could, and should have corrected, and which would have prevented the accident (37, 39, 40).

The Stevedore made no demand that the jury decide any other issues than those submitted to it. The Stevedore made no motion for a directed verdict. The only motion it made

at the trial was one to dismiss and the single ground urged was a claimed lack of evidence to show any negligence on the part of the Stevedore (42). The Stevedore was content to go to the jury on this sole ground and did not request that a special question or interrogatory be propounded to the jury regarding whether the Shipowner was negligent or the character of the Stevedore's negligence as compared with the Shipowner's. It did not ask the court to rule on such a question as a matter of fact or of law. No motions were made where the subject was even mentioned. The only motion made by petitioner was (42):

> "Mr. Bayer: If your Honor please, the third party defendant moves to dismiss the complaint of the third party plaintiff on the ground that there is no actionable negligence shown on the part of the defendant and indeed no negligence shown at all, sir."

The petitioner complains on page 10 that the trial court refused to formulate questions for the jury respecting the Shipowner's duties as compared with those of the stevedoring company. It also complains that there were not enough findings to support a verdict and refers to *Hodges* v. *Eastern*, 106 U. S. 408.

The petitioner fails to point out, however, that it did not ask that any questions on any further subjects be submitted to the jury. The petitioner also fails to state that *Hodges* v. *Eastern*, 106 U. S. 408 expresses a rule which is no longer the law. It has been supplanted by Rule 49 (a) of the Rules of Civil Procedure.

Under Rule 49 (a) of the Rules of Civil Procedure, which govern this proceeding, each party waives its right to a trial by jury as to any issue not submitted to the jury unless he demands its submission. In the absence of such a demand, the judge is permitted to make such a finding

and if the court fails to expressly do so, then "it shall be deemed to have made a finding in accord with the judgment on the special verdict".

The Stevedore did not make any demand that the jury decide any other issues than those submitted to it and the sole issue it demanded be submitted is: Was the Stevedore guilty of any negligence. The court, therefore, was privileged to make such findings and, in the absence of such findings, was deemed to have made those findings in accordance with the judgment. This means that the court necessarily found that the steamship company had not been guilty of active negligence or, indeed, of any negligence, but, on the contrary, had been liable to Parenzan solely on the basis that the unfit dunnage made the vessel unseaworthy—liability without fault. This is in accordance with finding No. 1 of the jury that the defective dunnage was the cause of Parenzan's accident.

It also means that the court found that the stevedoring company had breached its contract (warranty) with the Shipowner that it would perform the work in a competent and proper manner. The court had, in fact, charged the jury that such a duty was owed the Shipowner under the contract (61, 63). The Stevedore did not except.

The Circuit Court sustained the judgment on that ground, as well as on the ground that the Stevedore's belated contentions regarding active and passive negligence were not well founded.

POINT I.

THE EVIDENCE ESTABLISHED THAT THE STEVEDORE WAS ACTIVELY NEGLIGENT AS IT SHOWED THAT THE STEVEDORE, WITH KNOWLEDGE OF THE DANGER, PERMITTED THE WORK TO CONTINUE, ALTHOUGH THERE WAS A USUAL METHOD OF MAKING THE AREA SAFE.

Although questions of active and passive negligence are now irrelevant, because of this court's recent decision in the *Weyerhauser SS. Co.* v. *Nacirema Operating Co., Inc.*, ... U. S. ....., March 3, 1958* the petitioner still urges the matter in his petition. It is, therefore, necessary for the respondent to show here not only that the Stevedore did not make or save the point at the trial but that the ruling of the trial court and the circuit court on the subject was correct under the law as it stood at the time of the trial. The Stevedore should not be heard to complain here that it was wrong, particularly in view of the fact that the Stevedore was properly held liable for breach of its contractual warranty to perform its work in a reasonably, safe and competent manner.

Since the Stevedore made no motion for a directed verdict, the sufficiency of the evidence is not before the court. *Rotondo* v. *Isthmian Steamship Co.*, 243 F. 2d 581 (CA 2 1957); *Harriman* v. *Midland Steamship Line*, 208 F. 2d 564 (CA 2 1953).

Furthermore, in the only motion made by the Stevedore at the trial, *i.e.*, one to dismiss, the single ground urged

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*"In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS. Co*, *supra*, at 132-133."

was claimed lack of evidence to show any negligence by the Stevedore. The Stevedore was content to go to the jury on this ground alone and did not request that an interrogatory, regarding whether the Shipowner was negligent or the character of the Stevedore's negligence compared with the Shipowner, be submitted to the jury. Nor did it ask the court to rule as a matter of law on the question. No motions were made where the subject was even mentioned (42). In view of this position taken before the trial court, the question now raised by the Stevedore regarding claimed active negligence by the Shipowner and passive negligence by the Stevedore, is not reviewable upon appeal. *Jones Truck Lines* v. *Argo*, 237 F. 2d 649 (C. A. 8, 1956); *Stilwell* v. *Hertz Drivurself Stations Inc.*, 174 F. 2d 714 (C. A. 3, 1949); *Maryland Casualty Co.* v. *Talley*, 115 F. 2d 807 (C. A. 5, 1941); *Gardner* v. *Darling Stores Corporation*, 242 F. 2d 3 (C. A. 2, 1957).

But even if the Stevedore had raised the issues of the character of the Shipowner's liability and the relation between it and the negligence of the Stevedore, the proof shows that the Shipowner had been only passively negligent but the Stevedore had been actively negligent.

In the instant case, the Stevedore had full knowledge of the conditions in the hatch and still permitted Parenzan to work there. Such actions by the Stevedore, who was in charge of the cargo discharge operation, made it guilty of active negligence and required it to indemnify the Shipowner.

In *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9, 1950). the Shipowner had supplied the Stevedore with a defective winch which the Stevedore continued to use with knowledge of the defect until a longshoreman was injured. In allowing the Ship-

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owner full indemnity from the Stevedore, the court stated (p. 182):

> "It is clear that both the United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon (the injured man) to work in this dangerous circumstance as to which it was fully informed." (Matters in parentheses supplied.)

In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (1952), a Shipowner, which was in possession and control of its vessel, was held liable to a longshoreman, who was working aboard the vessel, for a condition of the cargo which was due to a defect in the containers. Nevertheless, the Shipowner was held entitled to recover against the Stevedore-employer of the plaintiff because the Stevedore had failed to warn its employees, including the plaintiff, of the dangers from the leaking containers. This right of indemnity was decreed despite the fact that the Shipowner also had a duty to warn the same employees.

In discussing the right of indemnity, the Court of Appeals stated (p. 328):

> "The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from contract, express or implied, and full, not partial, reimbursement is sought. Where several tortfeasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. The actively negligent tortfeasor is considered the primary or principal wrongdoer and is held responsible for his negligent act not only to the person directly injured thereby, but also to any other

> person indirectly harmed by being cast in damages by operation of law for the wrongful act. Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

In the course of its opinon in the *McFall* case, the New York Court of Appeals noted that the fact that both parties may be guilty of negligence as respects the person injured does not mean that they are in *pari delicto* as to each other.

In the *McFall* case, the Court of Appeals also said, after citing numerous cases (p. 330):

> "• • • None of those cases is vitally different from the present case In all of them a plaintiff recovered against a person, such as Belgian Line, who is under a non-delegable duty to furnish a safe place to such plaintiff but in each case the primary and affirmative wrong was occasioned by the defendants against whom indemnity was sought and indemnity was permitted. • • •"

In the instant case, the only active or affirmative act which caused Parenzan's injury, as found by the jury, was that of the Stevedore in permitting him to start and to continue work in an area known to be dangerous. Because of such action on its part, the Stevedore was required to indemnify the Shipowner.

It must be borne in mind that there was no proof offered at the trial to show that the Shipowner had any knowledge of the defective dunnage prior to the accident. Here again, counsel by argument rather than proof has attempted to supply this all important missing piece in the necessary chain of defense. However, arguments or assertions of counsel are no substitute for evidence. If the Stevedore had any such evidence it should have presented it at the trial and not attempted to establish it by counsel's argument on an appeal.

As the Stevedore was guilty of active negligence in permitting Parenzan to work in a known dangerous area, the judgment should be affirmed.

Petitioner has sought to suggest that this case falls within the class of cases where the shipowner has failed to correct or to warn the stevedore company of a latent dangerous condition known to the shipowner and unknown to the stevedoring company. The petitioner cites (p. 9, petitioner's brief) this court's language in the recent case of *Weyerhauser S. S. Co.* v. *Nacirema Operating Co., Inc.*, U. S. , March 3, 1958, as hinting that the shipowner could not recover from the stevedoring company in such a case.

However, the case at bar is not such a case. Here the condition was not latent, nor was it unknown to the stevedore. The jury expressly found that the stevedore foreman knew of the condition during the two hours before the accident.

The following question was presented to the jury and answered as follows:

> "Q. If your answer to question 1 is Yes, did the defendant, International Stevedoring Company, through its hatch foreman, Di Costanzo, know as the unloading of the cases progressed from 8:30 to 10:00 a. m., that defective or unfit dunnage had been used? A. Yes."

The petitioner had contended earlier in the trial that it had no notice of the frail dunnage condition, and made a motion to dismiss on that ground. However, it did not move for a directed verdict on that ground, and as the Circuit Court in its opinion pointed out, it waived its point by such omission (251 F. 2d 928, 930). In any event, the point was put at rest by the jury's finding.

Question Presented.

The question presented by this petition is actually far different from that set forth in the stevedore's petition on page 2. The question set forth by petitioner completely ignores the fact that respondent in its third party complaint sought indemnity because of the stevedore's breach of its contractual warranty to conduct the work in a competent and safe manner. In fact the "question presented" by the stevedore implies that no such claim was made. Here, the jury found, and its findings were supported by ample evidence, that Parenzan's accident was caused by defective dunnage; that the stevedore's hatch boss knew of the defect; that there were ordinary and usual precautions which a stevedore in the exercise of reasonable care should have taken to correct the condition and make the work area safe; that the stevedore did not take such reasonable precautions and that the failure to do so was the cause of Parenzan's accident.

"The question presented" by the petitioner also ignores the fact that because of the position taken by it in the trial court, it may not now raise the issues of the negligence of the Shipowner nor, if the Shipowner was negligent, the character of its negligence as compared to that of the stevedore's.

The actual question presented to this court may more correctly be stated to be: Where a longshoreman is injured as a result of defective dunnage and where the dunnage was known to be defective by his employer and where there are usual precautions which, in the exercise of reasonable care, might be taken by the employer to make the place safe but that the longshoreman's employer did not take such precautions and as a result of its failure, the longshoreman's injuries were caused, did such failure consti-

tute a breach of the employer's warranty to perform the stevedoring operation in a safe and proper manner so that the Shipowner is entitled to recover full indemnity.

The shipowner's right to recover for such breach of warranty is fully sustained by the Ryan and Weyerhauser decisions. The petition presents nothing new or worthy of this court's attention.

CONCLUSION.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE DENIED.

Respectfully submitted,

JAMES B. MAGNOR,
Attorney for Respondent,
Iino Kaiun Kaisha, Ltd.

VERNON S. JONES,
Of Counsel.